IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.....

CLOVER SPLINT COAL CO., INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT

Reference to the opinion below, a statement of the grounds upon which the jurisdiction of the court is invoked, and a statement of the case, under appropriate headings, are set out in the foregoing petition, and to avoid duplication are not repeated here.

SUMMARY OF ARGUMENT

A unique situation is here presented in which any consistent interpretation of Section 114(b)-4 of the Revenue Act of 1936 will necessarily result in sustaining one or the other of taxpayer's two contentions. At

the time petition was filed before the Tax Court (Board of Tax Appeals), the Circuit Court of Appeals for the Third Circuit in two decisions had adhered to a literal interpretation of the section in question. In the case of *Pittsburgh-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436, it was held that a taxpayer need not elect percentage depletion until the year in which it first had a net income, the literal reading of the words "first return" contained in the statute being rejected. In *Tonopah Mining Co.* v. *Commissioner*, 127 F. 2d 239, it was held that while a literal meaning of the latter part of Section 114(b)-4 of the Act of 1936, would make such act an extension of prior acts only in the case of transferred property, such literal meaning would not be followed.

The doctrine of the *Pittsburgh-Duryea* case, as counsel frankly admit, can no longer stand in view of *Mother Lode Coalition Mines Co.* v. *Helvering*, 317 U. S. 222, 87 L. ed. 227, but the Court of Appeals refused to recede from the doctrine in the *Tonopah* case, with the result: (a) The first contention of taxpayer originally made before the Tax Court is denied under the rule of *strict* construction, a literal meaning being given to the words "first return" as used in the statute, and (b) the second contention of the taxpayer is denied under the rule of *liberal* construction, the words in the statute with reference to Section 114(b)-4 being an extension of prior acts "for the purpose of determining whether the method of computing depletion allowance follows the property" being denied their literal meaning.

ARGUMENT

A consistent interpretation of the section should be given. If the section were liberally construed, taxpayer

would prevail under its first contention. If it be literally construed, taxpayer must prevail under its second contention.

INTERRRETATION OF THE STATUTE

At the time this appeal was filed with the Tax Court the validity of petitioner's first contention that it was entitled to a new election in 1936, because such was the first year in which it had a net taxable income, had been upheld by the Circuit Court of Appeals in *Pittsburgh-Duryea Coal Co.* v. *Commissioner*, 117 F. 2d 436. That Court gave a liberal interpretation to the section in question, refusing a literal reading thereof, saying on page 438 of the opinion:

> "Further, 'statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with legislative purpose'. Haggar Co. v. Helvering, 1940, 308 U. S. 389, 394, 60 S. Ct. 337, 339, 84 L. ed. 340. We think it would be an absurd result to construe this statute to require the taxpayer to choose a method of depletion and to state the method when there is nothing from which to make the deduction."

The effect of *Mother Lode Coalition Mines Co.* v. *Helvering*, decided by this Court on December 7, 1942, is later considered.

Prior to the *Mother Lode* case, however, the second question here present came before the Court of Appeals in *Tonopah Mining Co.* v. *Commissioner*, 127 F. 2d 239, decided on March 17, 1942. This case involved pre-

cisely petitioner's second contention and the Court recognized that the literal meaning of the qualification clause of the Act of 1936 would make it applicable only where there was a change of ownership, such recognition being clearly set out on page 244 of the opinion in the following language:

> "A literal meaning of these words implies that the sentence is inapplicable unless there has been a change of ownership."

Such, of course, is the only possible literal reading of the language in question, as it specifically states that the right of election is only subject to qualification *"for the purpose of determining whether the method of computing the depletion allowance follows the property."* Fully recognizing that a literal reading of the statute would render it applicable only where there was a change of ownership, the Court of Appeals, following in principle the *Pittsburgh-Duryea* case, refused to give such liberal interpretation, saying:

> "But such a result would be absurd. It would allow those who retained ownership after 1934 to elect anew, while binding those who took as successors in interest."

The Court continues:

> "If we are to avoid this curious result, what meaning is to be attached to the words 'follows the property'?"

In avoidance of such literal meaning the Court assigns a "contextual" meaning to the sentence, as if the words "through the years" came directly after "follows the property", making the words "follows the property"

synonymous with "adheres to the property". The conclusion of the Court is:

> "Since the literal meaning leads to an absurd result, it must be rejected in favor of a contextual meaning which accords with the legislative intent."

It will be noted that the following steps are taken by the Court: (a) It is stated that the literal meaning of the sentence in question would make it applicable only in case of transfer; (b) such would lead to an "absurd" result presumably contrary to the intention of Congress; and (c) to avoid this "curious result" words are to be inserted in the statute and a conclusion reached admittedly contrary to the literal meaning.

What is the result of this "contextual" interpretation? The opinion of the Court of Appeals states that such effect is to make the words "follows the property" synonymous with "adheres to the property". Such, of course, has the effect of making the paragraph apply to all property whether transferred or not and of making the act generally a continuation of the Act of 1934. So interpreted, the words become absolutely needless and meaningless, and the paragraph would operate as though the whole of the qualification section were omitted. Without it the section would read (asterisks showing omissions):

> "* * * this paragraph * * * shall be considered a continuation of Section 114(b) (4) of the Revenue Act of 1934, and as giving no new election in cases where such section would, if applied, give no new election".

If Congress had intended that the Act of 1936 should

be a general continuation of the Act of 1934, without qualification, it would have used such language. There would have been no reason for any qualification clause. The "contextual" interpretation of the Court as is most deferentially submitted, results in excising the qualification clause from the statute, depriving it of all function, no less effectually than if the clause were disregarded without explanation. Being in the statute, it may not be disregarded.

It is obvious that the position of the Court of Appeals in the *Tonopah* case and the instant case is diametrically opposed to the position taken by this Court in the *Mother Lode* and *Riley Investment Company* cases. Furthermore, it is to be emphasized that the part of Section 114(b) (4) immediately preceding the words in question deals with a transfer of property where the basis of such property is (under Section 113) determined by reference to the basis of a prior taxpayer. It is, therefore, clear that Congress had in mind a transfer when it inserted the words "follows the property" in the last sentence. However, even if the words were not used in this connection, their literal meaning is clear. They import a transfer of property.

It will, therefore, be noted that in both the *Pittsburgh-Duryea* case and the *Tonopah* case the Court of Appeals gave a consistent, liberal interpretation to the statute to avoid "absurd results", that precisely identical expression being used in both opinions. However, this Court gives a strict interpretation to the statute, not only in the *Mother Lode* case but in *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55, 85 L. ed. 36. In the latter case this Court frankly says that there may be basis for an appeal to Congress in

amelioration of the "strictness of that section", but such is for Congress. A strict construction had been characterized in the *Tonopah* case as "absurd" if it allow those who retained ownership of a property after 1934 to elect anew, while binding those who took as successors in interest, and, with almost the same language, the Circuit Court of Appeals had spoken of the same conclusion later reached in the *Mother Lode* case as "an absurd result". It is plain that this latter thought is fully answered in the *Mother Lode* opinion, but the same answer applies to the reasoning of the *Tonopah* case. Where language is clear, there is no room for construction, and the result that may follow in the application of a statute is a congressional, and not a judicial, responsibility. If the Act of 1936 be an extension of the Acts of 1934 and 1935, so that no new election may be given in any case, the underlined words of the statute are absolutely meaningless:— "The above right of election shall be subject to the qualification that this paragraph shall, *for the purpose of determining whether the method of computing the depletion allowance follows the property,* be considered a continuation of section 114(b) (4) of the Revenue Act of 1934, and as giving no new election in cases where such section would, if applied, give no new election." These words are used in the statute following language showing that Congress had in mind substituted bases in the case of transfers. They constitute, without ambiguity, a definite limitation of the extension provision of the statute. In such case it is not for a court to speculate as to legislative purpose. It may well have been that Congress desired to penalize the recipients of tax free transfers as contrasted with those who continued to hold property. However, such speculation is here beside the point for the words of limitation are specific and unambiguous. The

Act of 1936 is a general tax law, giving a new right of election except in those cases in which the limited provision extending the prior act is operative, and such extension is only to follow the property in the case of transfer.

A fundamental rule of statutory interpretation is that words of clear import may not be disregarded, and effect shall be given to every clause and part of a statute in the absence (as here) of irreconcilable inconsistency.—*Ginsberg & Sons* v. *Popinkin*, 283 U. S. 204, 76 L. ed. 704. Here, there is no difficulty in giving effect to the words in question. The position of the Circuit Court of Appeals may be fairly stated, we believe, as follows—while the words are there and their literal meaning is recognized in the *Tonopah* case, the Court weighs and rejects the *results* that would spring from giving them effect. If these words be disregarded, it is most respectfully submitted that the process is one not of *interpretation* by a court, but of *elimination* of statutory words, with attendant change in the scope of the statute itself.

It is most respectfully submitted that the court below has failed to recognize the issue here involved. It is stated in the opinion below that there was a "common sense" interpretation of the statute, designed to effectuate the plain intent of the Legislature in both the *Mother Lode* and *Tonopah* cases. Certainly no quarrel is taken with that statement as applied to the *Mother Lode* opinion where this Court points out the practical difficulties that would follow from other than a strict interpretation of the expression "first return", the necessity of keeping all returns open in order later to check depreciation and deductions, etc. The result in the

Mother Lode case is arrived at by giving full and certain effect to the wording of the statute, and the same is true of the *Riley Investment Company* case; but the statutory interpretation in the *Tonopah* case involves *elimination* of statutory words which definitely limit the purpose and scope of the statute itself. The Court states that petitioner's complaint is really of the "strictness" of the section as stated in the *Riley Investment Company* case. It is respectfully submitted with all deference that if the "strictness" of the section be invoked consistently taxpayer must prevail. It is not really, however, necessary to invoke so strict a construction as that in the *Riley Investment Company* case, because unless the words "for the purpose of determining the method of computing depletion allowance follows the property" be absolutely disregarded, eliminated through judicial excision, taxpayer must prevail. Such will produce no harsh results such as are referred to in the *Riley* case. Congress had a right to extend the Act of 1934 in cases of transfer with substituted bases in the hands of the transferee, and not extend that act in cases of properties held without transfer. Its purpose in so doing is not a matter of judicial question but even if the results were harsh, this Court will follow the statutory language.

Reference is again made to the *Riley* case, in which this Court stated that any harsh results that might follow the decision were a matter for Congress, and, a fortiori, it follows that if Congress were ill advised in limiting the extension provisions of the section in question, the correction of that policy is with Congress and not with the courts.

This Court has been consistent in upholding the doc-

trine here contended for. The case of *Scaife* v. *Commissioner*, 314 U. S. 459, 86 L. ed. 339, arose under the capital stock tax law, but strongly fortifies the contention of petitioner. The Court says in upholding a literal reading of the statute:

> "The result in individual cases may be harsh. But that may be true in case of any statute of limitations. As we indicated in J. E. Riley Invest. Co. v. Commissioner of Internal Revenue, supra, such considerations, though a basis for an appeal to Congress for relief in individual cases are not appropriate grounds for relief by the courts from the strictness of the statutory demand."

See also *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 86 L. ed. 343.

There is here present an obvious injustice to the taxpayer. However, a larger question is presented: A section of the Revenue Act has been inconsistently interpreted, whereby two statutory interpretations have been invoked, basically different in underlying philosophy, and applied to the same section. If the present status of precedent were not corrected by this Court the anomalous situation would be presented of Section 114(b)-4 of the Revenue Act of 1936, (and the corresponding provisions of other acts up to 1942) being interpreted strictly (under the decisions of this Court), except as to its later provisions. In the *Tonopah* case and this case, the holding of the Circuit Court of Appeals of the Third Circuit is "liberal" to the point of eliminating statutory language, as is most respectfully submitted.

CONCLUSION

It is respectfully submitted that this is a case in which the court, in its sound judicial discretion, may appropriately grant the writ of certiorari prayed for, and that the petition and the brief in support thereof present special and important reasons therefor.

ARTHUR S. DAYTON
Security Building
Charleston, West Virginia
WILLIAM WALLACE BOOTH
PAUL E. HUTCHINSON
Union Trust Building
Pittsburgh, Pennsylvania
Attorneys for Petitioner